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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

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9 IN AND FOR KING COUNTY

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11 **MELISSA MACKEY, et al**

12  
13 Plaintiffs,

14 vs.

15 **ROB MCKENNA**, in his official capacity as  
16 Attorney General of the State of Washington,

17 Defendant.  
18

)  
) No. 12-2-16042-2 SEA

) ORDER DENYING PLAINTIFFS'  
) MOTION FOR PRELIMINARY  
) INJUNCTION OR, ALTERNATIVELY,  
) FOR PERMANENT INJUNCTION OR  
) MANDAMUS

19 This matter came before the Court on Plaintiffs' Motion for Preliminary Injunction or,  
20 Alternatively, For Permanent Injunction and Mandamus:

21 The Court is fully advised, having considered the arguments of the parties and the  
22 following documents:

- 23 1. Plaintiffs' Motion for Preliminary Injunction or, Alternatively, for Permanent  
24 Injunction or Mandamus;  
25 2. Declaration of Professor Robert Aronson (filed under oath);  
26

ORDER DENYING MOTION 1

ORIGINAL

Hon. Sharon S. Armstrong  
King County Superior Court  
King County Courthouse,  
516 Third Avenue  
Seattle, Washington 98104

3. The Exhibits to the First Amended Complaint, authenticated by the Declaration of Claire Tonry;
4. Declaration of Plaintiffs Melissa Mackey;
5. Defendant Rob McKenna's Opposition Briefing and supporting documents;
6. Plaintiffs' Reply Briefing and supporting documents.

This Court DENIES Plaintiffs' Motion, based upon the following:

1. Rob McKenna is the attorney for the State of Washington in the lawsuit challenging the validity of the Patient Protection and Affordable Care Act ("ACA") currently pending before the United States Supreme Court. The outcome of that lawsuit will have a significant impact on the State of Washington and its residents. The State of Washington has received over \$133 millions in grants under the ACA, and will lose such income stream if the ACA is declared invalid in its entirety. The total invalidation of the ACA will mean the loss of the benefits for Washington residents, including for the women who have brought this lawsuit. The benefits to Washington State and to women's health care are described in the federal government documents attached to the First Amended Complaint.

2. Rob McKenna, in his capacity as Attorney General, has brought suit on behalf of the State of Washington to challenge the "individual mandate" and the Medicaid expansion. His authority to do so is not contested. See *City of Seattle v. McKenna*, 172 Wn.2d 551 (2011).

3. Plaintiffs assert that the Rules of Professional Conduct for attorneys govern the attorney general's duties, citing *Goldmark v. McKenna*, 172 Wn.2d 568, 581-582 (2011).

4. Plaintiffs further contend that Rob McKenna violated his ethical duties as a lawyer when (1) he submitted a brief to the U.S. Supreme Court that opposed the interests of his clients; (2) agreed to allow attorneys general from other states to determine the State of Washington's objectives in the litigation through a "majority rules" process; and (3) violated his duty of candor to the U.S. Supreme Court when he signed on to briefing and argument that mislead that Court as

1 to the position of Washington State on severability and the relief it seeks in the lawsuit, and the  
2 legal analysis of the State's attorney.

3 5. The Solicitor General has represented to this court that Rob McKenna in his  
4 capacity as Washington Attorney General has consistently opposed severability in his filings in  
5 the federal court litigation. According to Ms. Hart, Mr. McKenna has consistently opposed  
6 severability in the litigation before the U.S. District Court in State of Florida, et al. v. U.S.  
7 Department of Health and Human Services, et al, 780 F. Supp. 2d 1256 (N.D. Florida 2011); in  
8 the Court of Appeals, Florida, et al. v. Dept. of Health and Human Services, et al, 648 F.3d 1235  
9 (11<sup>th</sup> Cir. 2011), and now in the U.S. Supreme Court, Docket 11-400.

10 6. Thus, the attorney general has maintained a consistent legal position throughout  
11 the health care reform litigation. The solicitor general argues that this position reflects Mr.  
12 McKenna's legal judgment that opposing severability will best serve the interests of the State of  
13 Washington, even though it may harm the interests of many of its residents, including plaintiffs.  
14 She argues that Mr. McKenna made the legal judgment that he needed to oppose severability to  
15 most effectively challenge the mandate and extension of Medicaid issues.

16 7. As the Washington Supreme Court made clear in *City of Seattle v. McKenna*, 172  
17 Wn.2d 551 (2011), the court's role is not to evaluate the wisdom of the attorney general's  
18 decision to make the state a party to litigation challenging the constitutionality of the health care  
19 reform litigation. 172 Wn.2d at 556. The Court concluded that "The people of the state of  
20 Washington have, by statute, vested the attorney general with broad authority, and Attorney  
21 General McKenna's decision to sue to enjoin the enforcement of the PPACA falls within that  
22 broad authority." 172 Wn.2d at 564.

23 8. Had Attorney General McKenna taken the formal legal position that only  
24 severability could protect the interests of the State of Washington and its citizens, and then filed  
25 contrary briefing in the federal courts, he would have violated his ethical duty to faithfully  
26 represent the interests of the State of Washington and its residents, would have improperly

1 relinquished control over his role in the litigation to other attorneys general, and filed an  
2 erroneous brief to the U.S. Supreme Court.

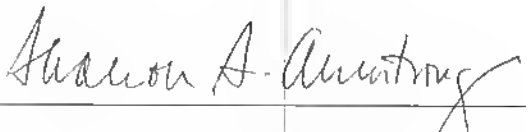
3 9. The Court finds that Rob McKenna's statements in press releases and on the Office  
4 Attorney General website are political statements by an elected official. Whether the statements  
5 that he supports severability in the ACA litigation are accurate, correctly reflect Mr. McKenna's  
6 personal beliefs, or are made for reasons of political expediency, are issues to be addressed in the  
7 political realm.

8 10. The Court lacks authority to second-guess the attorney general's legal strategy in  
9 the health care reform litigation, whatever the wisdom of his legal strategy. Plaintiffs do not  
10 establish that Attorney General McKenna's litigation strategy is arbitrary or capricious

11 11. For this reason, the court does not have a legal basis to grant the requested relief,  
12 under a claim for writ of mandamus or under the Declaratory Judgment Act.

13 IT IS ORDERED that plaintiffs' motion for relief is DENIED.

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15 Dated this 25th day of May, 2012.

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17   
18 HONORABLE SHARON S. ARMSTRONG